

6
No. 89-7260

Supreme Court, U.S.

FILED

JUL 24 1990

JOSEPH F. SPANIOLO,
CLERK

In The
Supreme Court of the United States
October Term, 1990

—♦—
WILLIAM J. BURNS

Petitioner,

v.

UNITED STATES

Respondent.

—♦—
On Writ Of Certiorari To The United States Court
Of Appeals For The District Of Columbia Circuit

—♦—
JOINT APPENDIX
—♦—

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Petition For Writ Of Certiorari Filed April 19, 1990
Certiorari Granted June 28, 1990

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**CHRONOLOGICAL LIST OF RELEVANT
DOCKET ENTRIES**

Date	Document
07.12.88	Complaint filed, arrest warrant executed
08.10.88	Information filed
08.11.88	Case assigned to Judge Norma Holloway Johnson. William Burns arraigned, waives indictment, and pleads guilty to counts 1, 2, and 3 of the information. Waiver of jury trial approved and plea agreement filed.
10.14.88	Sentencing - Counts 1, 2, and 3: (60) months each count to run concurrent with each other; three years supervised release, special assessment \$150.00, One hundred (100) hours of community service per year during supervised release. Defendant committed.
10.14.88	Receipt and acknowledgement of Presentence Investigation Report filed.
10.14.88	Order filed directing United States Marshal's Service to comply with requirements with respect to property transfers, liquidations, and sales set forth in restitution agreements.
10.14.88	Memorandum order concerning departure from Sentencing Guidelines filed.
10.24.88	Notice of appeal filed from sentence imposed 10-14-88 and from Memorandum Order filed 10-14-88 concerning departure from Sentencing Guidelines.
11.29.88	District Court grants Burns' application for leave to appeal in forma pauperis.
01.12.90	Decision and order of the United States Court of Appeals affirming the judgment of the District Court.

03.15.90 Burns' petition for rehearing and suggestion
for rehearing *en banc* denied.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA) Crim.
v.) No. 88-0302
WILLIAM J. BURNS)

Filed August 10, 1988

INFORMATION

The United States of America charges:

Count I

From on or about February 25, 1982, through on or about May 26, 1988, in the District of Columbia and elsewhere, the defendant WILLIAM J. BURNS did knowingly and willfully embezzle, steal, and purloin funds of the United States in the amount of \$1,215,110.45.

All in violation of Title 18, United States Code, Section 641.

Count II

On or about June 29, 1988, in the District of Columbia and elsewhere, the defendant WILLIAM J. BURNS did present for payment to the United States Department of the Treasury two claims against the United States, to wit: two Voucher and Schedule of Payments Form 1166's calling for payments on behalf of the United States Agency for International Development to Vincent Kauffman in the amounts of \$23,804.21 and \$22,270.46, when the

defendant WILLIAM J. BURNS knew said claims for payment to be false, fictitious, and fraudulent in that no money was due and owing from the United States Agency for International Development to Vincent Kauffman.

All in violation of Title 18, United States Code, Section 287.

Count III

From on or about February 25, 1982, through on or about May 26, 1988, in the District of Columbia and elsewhere, the defendant WILLIAM J. BURNS did willfully attempt to evade and defeat a large part of the income tax due and owing by him to the United States of America for calendar years 1982, 1983, 1984, 1985, 1986, and 1987 by maintaining a bank account in the fictitious name of Vincent Kauffman for the purpose of concealing additional unreported taxable income received by the defendant WILLIAM J. BURNS during said calendar years, on which said unreported taxable income, as he then and there well knew and believed, there was due and owing to the United States of America an income tax of \$475,685.00.

All in violation of Title 26, United States Code, Section 7201.

Respectfully submitted,
/s/ James M. Cole
/s/ Michael K. Fee
Trial Attorneys
Public Integrity Section
Criminal Division
U.S. Department of Justice

[U.S. Department Of Justice Letterhead Omitted]

CR 88-302

AUG 11 1988

David R. Addis, Esq.
Dickstein, Shapiro & Morin
2101 L Street, N.W.
Washington, D.C. 20037

Albert H. Turkus, Esq.
Dow, Lohnes & Albertson
Suite 500
1255 Twenty-Third Street, N.W.
Washington, D.C. 20037

Dear Messrs. Levine and Turkus:

Re: *United States v. William J. Burns* No. 88-0520M/
Misc. No. 88-226/Cr. No. 88-0302

I write to set out the terms of the agreement reached between the United States of America, William J. Burns, and Kathy Burns concerning the above referenced matters. The agreement is as follows:

1. Mr. Burns agrees to waive indictment and plead guilty to one count of theft of government funds (18 U.S.C. §641), one count of false claims against the United States (18 U.S.C. §287), and one count of tax evasion (26 U.S.C. §7201) as set out in the information attached as Exhibit A to this agreement. It is understood by all parties to this agreement that this plea will be covered by the Sentencing Guidelines. Based on each party's calculations it is assumed that a sentencing range of Level 19, Criminal History Category I, will apply to this case. If calculations by the United States Probation Office or the Court produces a different

sentencing range, either party may withdraw from this agreement and any property transfers done pursuant to this agreement will be null and void. No agreement exists as to what sentence Mr. Burns will receive within that sentencing range or what recommendation the United States will make at the time of sentencing. The United States will not oppose a continuation of Mr. Burns' present bond until the time of his surrender to the penal institution designated by the Bureau of Prisons.

2. Mr. Burns agrees to submit to full debriefings, under oath, and to provide truthful statements as to any and all criminal activity in which he has been involved or has knowledge, and agrees to cooperate fully with the United States in any investigations and prosecutions which may result from these debriefings.
3. Mr. Burns and his wife, Kathy Burns, agree to submit to full debriefings, under oath, and to provide truthful statements concerning the nature, location, method of acquisition and other details of any and all of their joint and individual financial holdings, including but not limited to real property, personal property, stocks, bonds, securities, safe deposit boxes, foreign bank accounts, foreign investments, domestic bank accounts, and domestic investments.
4. Any and all real property, personal property, money, stocks, bonds, securities, and other things of value owned by Mr. or Mrs. Burns will be conveyed and surrendered to the United States. Any and all property or things of value transferred in any way by Mr. or Mrs. Burns to persons, other than bona fide purchasers for value, will be

recovered by Mr. or Mrs. Burns and conveyed and surrendered to the United States. The only exceptions to this are the following items to be retained by Mrs. Burns:

- a. Property and funds which Mrs. Burns can establish were not acquired with any funds provided by Mr. Burns nor derived in any way from Mr. Burns;
 - b. One automobile and funds in the amount of \$10,000, to the extent Mrs. Burns' funds and property referenced in sub-paragraph (a), apart from necessary household and certain personal items, do not amount to this figure; and
 - c. Necessary household items, one wedding and engagement ring set, and the wedding gifts listed on Exhibit B to this agreement.
5. Mr. Burns will execute an agreement with the United States, which is not dischargeable in bankruptcy, wherein if he acquires funds over a specified value he will agree to pay to the United States the difference between the liquidated value of the property conveyed and surrendered to the United States under paragraph 4 above and the total amount the United States has lost as a result of his criminal acts throughout the period of his government employment.
 6. The United States will not prosecute Mr. Burns for any other criminal activity related to this matter. All charges currently pending and not incorporated in this agreement will be dismissed by the United States after Mr. Burns' plea has been accepted by the Court.

7. Any statements made by Mr. or Mr. Burns pursuant to this agreement will not be used against the person making the statement in any subsequent criminal proceeding other than perjury, making a false statement, or enforcement of this agreement. This grant of use immunity is understood by all parties to be only as extensive as the immunity provided for in 18 U.S.C. 6001 *et seq.*, except that the United States is free to use information derived from such statements against the person making the statements.
8. The United States will bring no criminal charges against Mrs. Burns in relation to this matter.
9. Nothing in this agreement affects or is intended to affect any civil tax liability of Mr. and/or Mrs. Burns.
10. If it is determined by the United States that Mr. or Mrs. Burns has knowingly given false, incomplete, or misleading testimony or information, or has failed in any way to fulfill completely each and every one of their respective obligations under this agreement, they will be in violation of this agreement and the United States will be released from its commitment to honor any and all of its obligations under this agreement. Mr. and Mrs. Burns understand and explicitly agree that if they fail to fulfill any of their respective obligations under this agreement, including the giving of truthful information, the United States would be free, where appropriate in its discretion, to prosecute either or both of them for perjury, false statements, and/or obstruction of justice, to move to vacate Mr. Burns' guilty plea, and to nullify this agreement in its entirety.

11. No promises, representations, or inducements have been made to Mr. and Mrs. Burns other than what is contained in this letter. Any changes to this agreement must be made in writing and signed by all parties.

If this agreement comports with the understanding of all parties please signify so by having all parties sign it below.

Sincerely,

/s/ James M. Cole
Counsel for the United States

/s/ Michael K. Fee
Counsel for the United States

We have consulted with our attorneys and fully understand all of our rights in relation to this matter. We have read the foregoing agreement between the United States of America and William J. Burns and Kathy Burns and have carefully reviewed every part of it with our attorneys. We understand all of the terms and agree to them.

8-11-88
DATE

/s/ WILLIAM J. BURNS

8-11-88
DATE

/s/ KATHY BURNS

We are the attorneys for William J. Burns and Kathy Burns. We have fully explained their respective rights to them in relation to this matter. We have carefully reviewed every part of this plea agreement with Mr. and Mrs. Burns. To our knowledge, their decision to enter into this agreement is an informed and voluntary one.

8/11/88
DATE

/s/ DAVID R. ADDIS
Counsel for William J. Burns

8/11/88
DATE

/s/ ALBERT H. TURKUS
Counsel for Kathy Burns

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

United States of America)	
vs.)	Docket No.
BURNS, William J.)	88-0302-01

PRESENTENCE REPORT

<i>Prepared for:</i>	The Honorable Norma H. Johnson United States District Judge
<i>Prepared by:</i>	Ralph Ardito, Jr. United States Probation Officer Telephone: 535-3181
<i>Sentencing date:</i>	October 11, 1988 at 9:45 a.m.
<i>Offense:</i>	Count 1: 18 U.S.C. 641, Theft of Government Funds, a class C fel- ony Count 2: 18 U.S.C. 287, False Claims Against the Government, a class D felony Count 3: 26 U.S.C. 7201, Tax Evasion, a class D felony
<i>Release status:</i>	Arrested on July 12, 1988; released on July 18, 1988, on a \$500,000 property bond and has remained in the community since that time.
<i>Identifying Data</i>	
Date of Birth:	February 19, 1940
Social Security Number:	578-54-8762
Address:	3048 Brownstone Court Burtonsville, Maryland 20866
<i>Detainers:</i>	None
<i>Codefendants:</i>	None
[Handwritten entry]	
10/14/88:	60 months confinement, 3 yrs. supervised release.

100 hrs. community service per year in lieu of fine.

Court recommends FCI Allenwood.

Assistant U.S. Attorney
James Cole
Public Integrity Section
Department of Justice
1400 New York Avenue,
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Washington, D.C. 20005
Telephone: 786-5056

Defense Counsel
David Addis (Retained)
c/o Dickstein, Shapiro &
Morin
2101 L Street, N.W.
Washington, D.C. 20037
Telephone: 785-9700

Date Report Prepared:
Date Revised:

September 20, 1988

PART A. THE OFFENSE

Charge(s) and Conviction(s)

1. On August 10, 1988, William J. Burns was named in a three count Information charging him with Theft of Government Property, in violation of Title 18, U.S. Code, Section 641 (Count 1); False Claims Against the Government, in violation of Title 18, U.S. Code, Section 287 (Count 2); and Tax Evasion, in violation of Title 26, U.S. Code, Section 7201 (Count 3). On August 11, 1988, the defendant appeared before the Honorable Norma Holloway Johnson, at which time he entered a plea of guilty to the three count Information. At the time of plea, a sentencing date was scheduled for October 11, 1988, at 9:45 a.m.
2. Since the offense took place after November 1, 1987, the Sentencing Reform Act of 1984 is applicable.

Related Cases

3. None.

The Offense Conduct

4. In December of 1987, the Agency for International Development conducted a routine background check

on the defendant as he maintained a security clearance with that agency. The investigation determined that the defendant was living in a Burtonsville, Maryland home valued in excess of \$400,000, which raised suspicions as the defendant's income was \$35,108. As a result, a credit check was done, where the agency discovered numerous bank accounts in the defendant's name. An analysis of the bank records revealed numerous checks authorized by the Agency for International Development originally payable to Vincent Kaufman, subsequently deposited into Mr. Burns' account. It was later proven by way of handwriting analysis that Vincent Kaufman was, in fact, William Burns.

5. The internal investigation determined the following scheme, which resulted in the theft of Government funds by the defendant. Mr. Burns, as supervisor of the Financial Management Section, with authority to approve travel vouchers, would issue a false claim (Form 1034) in the name of Vincent Kaufman. Vincent Kaufman allegedly was a contractor who would move furniture for the Agency for International Development. The false form was prepared by a clerk and subsequently approved by the defendant. The voucher would then be sent to the U.S. Treasury Department for payment to Vincent Kaufman. The payment checks were then sent directly to the account of Vincent Kaufman for deposit and subsequently removed by the defendant. The Government has determined that 53 fraudulent checks were issued and the total amount of the theft was \$1,261,184.92.
6. Mr. Burns fully admitted that he committed this offense, stating that he was in financial difficulty at the time it occurred. Also, he was being divorced from his first wife and at least initially, the stolen funds were used to pay his required child support payments. Subsequently, the money was used to impress his girlfriend, Kathy Martini, whom he later

married. He said that not only did he deceive his wife and family, but ultimately, himself.

7. Between February 25, 1982 and May 26, 1988, the defendant embezzled from the Agency for International Development \$1,261,184.92, which monies he failed to report to the Internal Revenue Service for calendar years 1982, 1983, 1984, 1985, 1986, and 1987. As a result of his failure to report this income, he has an outstanding tax obligation of \$475,685.

Adjustment for Obstruction of Justice

8. The Probation Officer has no information to suggest that Mr. Burns impeded or obstructed justice in this case.

Adjustment for Acceptance of Responsibility

9. Mr. Burns has fully accepted responsibility for the theft of approximately \$1.2 million. He has fully cooperated with the Government in identifying the properties and monies that were recoverable and he has agreed to transfer any and all assets to the Government.

Offense Level Computation

10. Counts 1 and 2 of the Information represent related offense conduct and each count is treated as a single group. Section 3D1.2(1).
11. Because Count 3 of the Information represents an unrelated offense, this count will be treated as a separate group. Section 3D1.3(a).

Counts 1 and 2 - Theft of Government Funds and False Claims Against the Government

12. Base Offense Level: The guideline for 18 U.S.C. 641 and 18 U.S.C. 287 is found in Section 2B1.1(b)(1) and 2F1.1 of the Guidelines. Those sections provide that Theft of Government Funds and False Claims Against the Government in the amount of \$1,215,110.45 have a base offense level of 17.

13. Specific Offense Characteristics: The defendant was a public servant who violated a trust and used a special skill in a manner to significantly facilitate the commission of the offense. Based on Section 3B1.3, the offense level is increased two levels.

14. Victim Related Adjustment: None

15. Adjustment for Obstruction of Justice: None

16. Adjusted Offense Level (subtotal):

Count 3 - Tax Evasion

17. Base Offense Level: The guideline for 26 U.S.C. 7201 is found in Section 2T1.1 (a) of the Guidelines (sic). That section provides that Tax Evasion has a base offense level of 14.

18. Specific Offense Characteristics: As the defendant failed to report income exceeding \$10,000, an increase of 2 levels is appropriate (Section 2T1.1(b)(1)(A)).

19. Adjustment for Role in the Offense: None

20. Victim Related Adjustment: None

21. Adjustment for Obstruction of Justice: None

22. Adjusted Offense Level (subtotal):

Multiple Count Adjustment (see Chapter 3, Part D).

Units

Counts 1 and 2: Adjusted Offense Level	19	
Count 3: Adjusted Offense Level	16	
Total Units		2
Greater of the Adjusted Offense Levels	19	
Increase in Offense Level	2	
Combined Adjusted Offense Level	21	

23. Adjustment for Acceptance of Responsibility: The defendant fully accepted his responsibility in Counts 1, 2 and 3 of the Information. Based on Section

3E1.1(a), the combined adjusted offense level is reduced two levels.

24. Total Offense Level:

PART B. THE DEFENDANT'S CRIMINAL HISTORY

Juvenile Adjudications.

25. None.

Criminal Convictions.

26. None.

Other Criminal Conduct

27. None.

PART C. SENTENCING OPTIONS

Custody

28. Statutory Provisions: The maximum term of imprisonment for Count 1 is ten years.

29. Statutory Provisions: The maximum term of imprisonment for Count 2 is five years.

30. Statutory Provisions: The maximum term of imprisonment for Count 3 is five years.

31. Guideline Provisions: Based on a total offense level of 19, and a criminal history category of I, the guideline imprisonment range is 30 to 37 months.

Supervised Release

32. Statutory Provisions: A term of not more than three years may be imposed in Count 1 (18 U.S.C. 3583(b)(2)).

33. Statutory Provisions: A term of not more than three years may be imposed in Counts 2 (18 U.S.C. 3583(b)(2)).

34. Statutory Provisions: A term of not more than three years may be imposed in Count 3 (18 U.S.C. 3583(b)(2)).

35. Guideline Provisions: A term of at least two years, but not more than three years in Count-1 (Section 5D3.2(b)(2)).

36. Guideline Provisions: A term of at least two years, but not more than three years in Count 2 (Section 5D3.2(b)(2)).

37. Guideline Provisions: A term of at least two years, but not more than three years in Count 3 (Section 5D3.2(b)(2)).

Probation

38. Statutory Provisions: The defendant is not eligible for probation (18 U.S.C. 3561(a)(1)).

39. Guideline Provisions: The defendant is not eligible for probation according to Section 5C2.1(f).

PART D. OFFENDER CHARACTERISTICS

Family Ties, Family Responsibilities and Community Ties

40. The defendant was born to the legal union of Edward and Margaret (nee: Ellis) Burns in New York, New York on February 19, 1940. The defendant's father was employed as a Government worker and his mother was a housewife. He described his upbringing as normal, with no unusual problems. The defendant has three older siblings, Edward Burns who is employed as a certified public accountant; Margaret Burns Hughes who is employed as a secretary; and Nora Burns Hanrahan who works as a trainer for the C&P Telephone Company. All three siblings remain close with the defendant and reside in the metropolitan Washington, D.C. area. The defendant is the only sibling to have been involved in the criminal justice system.

Mr. Burns' father died at the age of 78 and his mother died, also at the age of 78.

41. The defendant was initially married to Barbara (nee: Robeson) Burns on February 8, 1962 in Bethesda, Maryland. As a result of the marriage, three children (Susan, age 19; Deborah, age 18; and Jacqueline, age 15) were born. The couple remained together until each sought a voluntary separation based on irreconcilable differences. On November 9, 1982, a decree of divorce was granted in the Circuit Court for Montgomery County (Equity No. 76296). The settlement agreement decreed that the defendant's wife would have custody of the three daughters and Mr. Burns was obligated to pay \$210 per month for each child until his daughters reached the age of 18. The defendant was granted visitation rights. Mr. Burns agreed to transfer to his first wife his interest in their residence for the sum of \$15,000. The defendant explained that he continues to maintain an excellent relationship with his three children and he has met the Court-ordered child support requirements. He characterized his current relationship with his former wife as poor.

42. The defendant married his current wife, Cathy (nee: Martini) Burns, age 32, on October 26, 1985, in Lanham, Maryland. As a result of this union, twin boys (William, Jr. and Robert Edward), age 23 months, were born. Mr. and Mrs. Burns appeared to have a very caring and supportive marriage and they remain committed to each other during this difficult time. It was obvious that both individuals were under a great deal of stress, the result of Mr. Burns' pending incarceration.

Mental and Emotional Health

43. There is no indication to suggest that Mr. Burns has suffered from any psychological or psychiatric impairment. The defendant was able to articulate his motivation for his involvement in the instant offense and he had excellent recall.

Physical Condition, Including Drug Dependence and Alcohol Abuse

44. The defendant stands 5'8" tall and weighs approximately 170 pounds. He characterized his physical health as excellent.
45. The defendant explained that he has never used any narcotic or mind-altering drugs. He remarked that he drinks alcohol occasionally and on a social basis.

Education and Vocational Skills

46. Mr. Burns graduated from Coolidge High School in June of 1958, in Washington, D.C. He attended Montgomery College in Takoma Park, Maryland from 1958 to 1961, majoring in business administration.

Employment Record

47. From 1967 until July 1988, Mr. Burns was employed with the United States Agency for International Development, located at 522 22nd Street, N.W., Washington, D.C. On July 29, 1988, and as a result of his arrest, he was suspended by that agency without pay. At the time of the suspension, he was employed as a supervisor for the Financial Management Section as a GS-11/step 9, earning \$35,108 per year.
48. His former supervisor, Mr. Kyle Schooler, said that in his opinion, the defendant was hard-working, reliable and trustworthy. Further, Mr. Burns' integrity was never questioned during the two year period Mr. Schooler supervised the defendant.
49. Prior to this employment, he was also employed by the United States Postal Service and the Department of Labor for approximately four years.

PART E. FINES AND RESTITUTION

Statutory Provisions

50. *Count 1:* The maximum fine is \$250,000 (18 U.S.C. 3571(b)(1)(A)).
51. *Count 2:* The maximum fine is \$250,000 (18 U.S.C. 3571(b)(1)(A)).
52. *Count 3:* The maximum fine is \$250,000 (18 U.S.C. 3571(b)(1)(A)).
53. A special assessment of \$50 on each count (total: \$150) is mandatory (18 U.S.C. 3013).
54. According to the Public Integrity Section, Department of Justice, the United States Government is the victim in this case. Specifically, the defendant illegally stole \$1,261,184.92. Per the plea agreement, the defendant is to transfer all monies and title to properties to the United States Government. It is estimated that the United States will receive between \$600,000 and \$700,000 in monies and properties when the transfer is completed. Thus, the loss to the Government is \$561,184.92. In the event that there is Court-ordered restitution, it should be payable to the U.S. Treasury.

Guideline Provisions

55. The fine guideline range for this offense is from \$6,000 to \$250,000.

Defendant's Ability to Pay

Assets

Cash (wife, per plea agreement) \$ 10,000

Unencumbered Assets

Vehicle (Ford Aerostar Van (wife)) 16,000

Encumbered Assets None

TOTAL ASSETS 26,000

Liabilities

Secured Debts	None
Unsecured Debts	
Legal Fees (defendant)	35,000
Legal Fees (wife)	15,000
Federal tax obligation (before penalties and interest)	475,685
Connecticut Avenue Caterers	1,500
Credit cards (total)	8,977
TOTAL DEBT	536,162
NET WORTH	- 510,162

Monthly Cash Flow

Income None

Necessary Living Expenses

Mortgage	695
Food	800
Medical expenses	130
Water	55
Gas	55
Electric	196
Telephone	40
Life Insurance (no cash value)	100
Credit cards	207
Child support payment	210
TOTAL	2,488

NET MONTHLY CASH FLOW - 2,488

56. It appears from the defendant's financial statement that he is unable to pay a fine, the cost of incarceration or supervised release.

PART F. FACTORS THAT MAY WARRANT DEPARTURE

57. There are no factors that would warrant departure from the guideline sentence.

PART G. IMPACT OF THE PLEA AGREEMENT

58. The defendant entered pleas of guilty to all counts of the Information in which he was charged. Therefore, the plea agreement did not impact on the possible sentence that could be imposed.

Respectfully submitted,
EUGENE WESLEY, JR.
CHIEF U.S. PROBATION
OFFICER

/s/ By: Ralph Ardito, Jr.
U.S. Probation Officer

RARDITOjr:nlc

Reviewed and Approved:

/s/ Arthur Carrington
Supervising U.S. Probation Officer

ADDENDUM TO THE PRESENTENCE REPORT

The Probation Officer certifies that the presentence report, including any revision thereof, has been disclosed to the defendant, his attorney, and counsel for the Government.

OBJECTIONS

By the Government

The Assistant U.S. Attorney has reviewed the presentence report but has filed no objections within the prescribed ten-day period.

By the Defendant

The defendant, and his counsel, have reviewed the presentence report, but have filed no objections within the prescribed ten-day period (sic).

CERTIFIED BY
EUGENE WESLEY, JR.
CHIEF U.S. PROBATION
OFFICER

/s/ By: Ralph Ardito, Jr.
U.S. Probation Officer

Reviewed and Approved:

/s/ Arthur Carrington
Supervising U.S. Probation Officer

Date: _____

EXPLANATION OF THE PRESENTENCE REPORT

This explanation is intended to acquaint the bench and bar with the format of the presentence report and to inform all parties about the purpose of each section and how the information reported is related to the Sentencing Reform Act and the Guidelines issued under it by the United State Sentencing Commission.

PART A. THE OFFENSE

Charge(s) and Conviction(s)

This section reports the charge against the defendant and the present status of the charge. The statute violated, the title of the offense, and the date of the offense are presented. If there are codefendants, the status of each codefendant is described.

Related Cases

Any separate cases arising out of the instant offense are referenced.

The Offense Conduct

This section describes the offense conduct that is relevant to the determination of the offense level under Chapter 2 of the Guidelines. It also describes the role the defendant played in carrying out the offense, which may result in an adjustment to the offense level pursuant to Chapter 3, Part B of the Guidelines. This section identifies any victim of the offense and any harm the victim suffered, which may result in an adjustment under Chapter 3, Part A, and may also be relevant in determining if restitution is required. It includes information indicating whether the offense of conviction was part of a

scheme or plan that included other criminal conduct, and information which may be relevant to the defendant's state of mind or motive in committing the offense. Such information may be relevant to the determination of the appropriate guideline, the selection of a sentence within the guideline range, and the decision to depart from the Guidelines.

Adjustment for Obstruction of Justice

This section contains information that is relevant to determining whether the defendant obstructed justice during the investigation or prosecution of the offense of conviction. Under Chapter 3, Part C of the Guidelines, an adjustment to the offense level is to be made if obstruction of justice occurred. In addition to the information reported here, the Judge may consider any obstruction of justice committed by the defendant in the presence of the Court.

Adjustment for Acceptance of Responsibility

This section contains information that is relevant to determining whether an adjustment of the offense level is warranted based on the defendant's acceptance of responsibility for the offense of conviction. This adjustment is authorized by Chapter 3, Part E of the Guidelines.

Offense Level Computation

This section presents the calculation of the total offense level. For each count, it identifies the applicable guideline and shows the base offense level, any specific offense characteristics that modify the base offense level, and any adjustments that affect the offense level. In cases involving multiple counts, the groups of closely related counts are displayed. The number of

units for each count or group of closely related counts is identified and the combined adjusted offense level for the entire case is computed. (See Chapter 3, Part D of the Guidelines).

If the defendant is a career criminal or committed the instant offense as part of a pattern of criminal conduct from which he derived a substantial portion of his income as defined in Chapter 4, Part B of the Guidelines, the defendant's total offense level may be increased. Any such increase is set forth in this section, following the total offense level computation, and is based on information appearing later in this report.

PART B. THE DEFENDANT'S CRIMINAL HISTORY

This part contains the record of the defendant's criminal history and the calculation of the defendant's criminal history category under the Guidelines. Section 4A1.1(a) through (e) of the Guidelines establish numerical values for prior convictions as follows:

- (a) 3 POINTS for each prior adult sentence of imprisonment exceeding one (1) year and one (1) month that was imposed within fifteen (15) years of the defendant's commencement of the instant offense or that resulted in the defendant's incarceration during any part of that fifteen-year period. (See Sections 4A1.1(a) and 4A1.2).
- (b) 2 POINTS for each prior adult or juvenile sentence of imprisonment of at least sixty (60) days not counted under paragraph (a) above, if the prior sentence was imposed within ten (10) years of the commencement of the instant offense. However, for an offense committed before age 18, the sentence will only be counted if the defendant

was released from confinement within five (5) years of the commencement of the instant offense. (See Sections 4A1.1(b) and 4A1.2).

- (c) 1 POINT for each prior adult or juvenile sentence not counted under paragraphs (a) or (b) above, if the prior sentence was imposed -
 - (1) within ten (10) years of the commencement of the instant offense if the defendant was 18 or over at the time the prior offense was committed; or
 - (2) within five (5) years of the commencement of the instant offense if the defendant was under 18 at the time the prior offense was committed. (See Sections 4A1.1(c) and 4A1.2).
- (d) 2 POINTS if the defendant committed the instant offense while under any criminal sentence (for example, while in prison; or on work release, parole, supervised release, or probation, or while in escape status). (See Sections 4A1.1(d) and 4A1.2).
- (e) 2 POINTS if the defendant committed the instant offense less than two (2) years after release from imprisonment on a sentence counted under paragraphs (a) or (b) above. However, only one (1) point is added if two (2) points were added under paragraph (d) above. (See Sections 4A1.1(e) and 4A1.2).

See Section 4A1.2 of the Guidelines for definitions and instructions for calculating the criminal history category, including a list of convictions that are not counted.

Juvenile Adjudications/Criminal Convictions

This section contains a report of the defendant's record of juvenile adjudications of guilty or delinquency, criminal convictions, and diversionary dispositions based on a finding or admission of guilt. Adjudications and convictions are included in chronological order, whether or not they are used in calculating the criminal history category under the Guidelines; the value assigned to each sentence under Section 4A1.3 of the Guidelines is shown. Convictions not used in the calculation may be considered by the sentencing Judge in deciding whether to depart from the guideline range. In addition, the entire record of convictions may be relevant in selecting a sentence within the applicable guideline range and in determining conditions of probation or supervised release.

Criminal History Computation

This Section contains the calculations of the criminal history category under the Guidelines. It is based entirely on the criminal record reported in the previous section. If the defendant is a career criminal as defined in Chapter 4, Part B of the Guidelines, the defendant's total offense level may increase and the defendant's criminal history category shall be VI (the highest criminal history category provided in the Guidelines).

Other Criminal Conduct

This section reports on prior unadjudicated criminal conduct that may have made the defendant's commission of the offense of conviction more serious and therefore deserving of greater punishment, and/or may indicate a propensity to engage in criminal conduct and therefore a

need to incapacitate the defendant. Such conduct may be relevant in determining whether the offense of conviction was part of a pattern of criminal conduct from which the offender derived a substantial portion of his income. See Section 4B1.3 of the Guidelines. Section 4A1.3 of the Guidelines suggests that such conduct may also be considered by the sentencing Judge as a ground for departing from the Guidelines. The conduct reported in this section may also be relevant in determining conditions of probation (sic) or supervised release.

Pending Charges

This section lists any pending charges against the defendant. This section is omitted if there are no pending charges.

PART C. SENTENCING OPTIONS

This part sets forth the penalties authorized by statute and the kinds of sentences available under the Guidelines. Included are (1) the range of possible prison terms set forth in the sentencing table in Chapter 5, Part A of the Guidelines; (2) possible sentences not involving imprisonment; and (3) options for post—release supervision if a term of imprisonment is imposed. The statutory provisions and the guideline provisions for each, including custody, probation, and supervised release, are presented for reference and comparison.

Relevant policy statements of the United States Sentencing Commission are set forth. Fines and restitutions are not discussed in this part; they are treated in Part E of the report.

PART D. OFFENDER CHARACTERISTICS

This part contains information that may be relevant in determining the appropriate term, if any, and conditions of probation or supervised release. It may also be relevant to the defendant's ability to make restitution or pay a fine, discussed more fully in Part E. The information set forth in this part is generally not to be used in determining whether a defendant is to be incarcerated or for how long. (See 28 U.S.C. 944(e); Guidelines, Chapter 5, Part H). However, some of the information may be relevant in determining whether to depart from the Guidelines.

PART E. FINES AND RESTITUTION

This part sets forth the statutory provisions governing fines, special assessments, and restitution. It also contains the guideline recommendations with regard to fines and contains an assessment of the defendant's ability to make restitution or pay a fine. If the defendant is unable to pay a fine, Section 5E4.2(f) of the Guidelines requires the Court to consider alternative sanctions such as community service. In some cases, statutes require forfeiture of certain of the defendant's assets. These provisions are not addressed in the presentence report except insofar as forfeiture may reduce the assets available for fines and restitution.

PART F. FACTORS THAT MAY WARRANT DEPARTURE

This part contains the Probation Officer's statement of "any factors that may indicate that a sentence of a different kind or of a different length from one within the applicable guideline would be more appropriate under all the circumstances." Fed.R.Crim.P. 32(c)(2)(B). Such

factors include those set forth in Chapter 5, Part K of the Guidelines. Inclusion of a factor in this part does not constitute a recommendation by the Probation Officer that a departure be made.

PART G. IMPACT OF THE PLEA AGREEMENT

This part is included in presentence reports that are prepared when a plea agreement has been tendered to the Court. In it, the Probation Officer assesses the impact of the plea agreement on the guideline sentence by comparing the guidelines applicable under the plea agreement with the guidelines that would apply if the defendant were to plead to all counts. The analysis is based on the assumption that the allegations of the counts to be dismissed could be proven, and that additional relevant factors in the investigative files are correct.

ADDENDUM TO THE PRESENTENCE REPORT

In some Courts the presentence report is disclosed to the defendant, counsel for the defendant, and counsel for the Government before it is submitted to the Judge. This procedure allows both counsel to communicate with the Probation Officer to resolve any concerns or objections regarding material information, sentencing classifications, or the sentencing guideline range contained in the presentence report. Early disclosure of the report to the attorneys allows the Probation Officer to conduct any further investigation and make revisions to the presentence report that may be necessary. Any unresolved issues or objections are reported to the sentencing Judge in an addendum to the presentence report. The addendum also contains the Probation Officer's comments regarding the issues.

[Caption Omitted In Printing]
RECEIPT AND ACKNOWLEDGEMENT OF
PRESENTENCE INVESTIGATION REPORT

Filed Oct. 14, 1988

This is to acknowledge that each of the undersigned has received, read, understand, and fully discussed with each other, the Presentence Investigation Report and worksheet computations regarding Guideline Sentencing in the above-entitled case. The undersigned further acknowledge that:

(CHECK APPROPRIATE BOX)

(X) there are no material factual inaccuracies therein

() there are material factual inaccuracies in the PSI report and/or worksheet computations and those are set forth in the attached Memorandum. The location (paragraph and page) of the alleged inaccuracies should be specified. In the event that these material inaccuracies are not resolved by the Probation Officer or the other parties, the Probation Officer shall request the Court to permit testimony at the sentencing hearing regarding these material inaccuracies and request the Court, for scheduling purposes, to set aside time for consideration of ___ number of exhibits and ___ number of witnesses to be heard.

/s/ William J. Burns
 9/28/88
 (Date)

/s/ David R. Addis
 9/26/88
 (Date)

This is to acknowledge that I have received, read, and understand the Presentence Investigation Report and worksheet computations regarding Guideline Sentencing in the above-entitled case. The undersigned further acknowledges that:

(✓) there are no material factual inaccuracies in the Report.

() there are material inaccuracies in the PSI Report and/or worksheet computations and those are set forth in the attached Memorandum. The location (paragraph and page) of the alleged inaccuracies should be specified. In the event that these material inaccuracies are not resolved by the Probation Officer or the other parties, the undersigned shall request the Court to permit testimony at the sentencing hearing regarding these material inaccuracies and request the Court, for scheduling purposes, to set aside time for consideration of ___ number of exhibits and ___ number of witnesses to be heard.

/s/ Michael K. Fee USDOJ
 9/23/88
 Date

NOTICE OF OBLIGATION OF THOSE
EXECUTING THIS FORM

It is the Court's request that those executing this form who claim material inaccuracies or dispute any portion of the PSI Report or guideline computations shall first submit the case in writing to the Probation Officer and, thereafter, arrange for a conference with him/her to the end that any disputes may be resolved prior to the sentencing hearing. It is also understood that counsel for the government and the defense may be requested to have a joint conference with the Probation Officer in a further effort to resolve any disputes prior to the sentencing hearing and submission of the PSI and accompanying worksheets to the sentencing Judge.

FOR THE COURT

By: Eugene Wesley, Jr.,
Chief Probation Officer
U.S. District Court, D.C.

STATEMENT OF CLAIMED INACCURACIES THAT
ARE MATERIAL TO SENTENCING

[Third Page Blank And Not
Included In Joint Appendix]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Caption Omitted In Printing]

TRANSCRIPT OF SENTENCING
BEFORE THE HONORABLE NORMA HOLLOWAY
JOHNSON, UNITED STATES DISTRICT JUDGE
October 14, 1988

[2] PROCEEDINGS

THE DEPUTY CLERK: United States of America
versus William J. Burns, Criminal No. 88-302.

Mr. Cole and Mr. Fee are here for the government.
Mr. Eisenstat and Mr. Addis are here for the defendant,
who is present, and Mr. Ardito is here for the probation
office.

THE COURT: All right, Mr. Burns, if you will come
forward, please, with your counsel.

MR. ADDIS: Good afternoon, Your Honor.

THE COURT: Good afternoon.

You are Mr. William J. Burns?

THE DEFENDANT: I am, Your Honor.

THE COURT: Mr. Burns, you will perhaps recall
that you appeared before me on August 11, 1988, and
entered pleas of guilty to three counts of an information. I
accepted your pleas of guilty, continued the matter for
sentencing with the request that the probation depart-
ment prepare an investigation and a report to me.

I have received that report from the probation department and I have been advised by the probation officer, Mr. Ardito, that it has been presented to you and your attorney and to government counsel, that both sides have had an opportunity to review it and have acknowledge receipt of it through this document.

I note that you and Mr. Addis have stated that there [3] are no material factual inaccuracies within the report that has been provided to me by the probation department.

Is this indeed your signature?

THE DEFENDANT: It is, Your Honor.

THE COURT: And your acknowledgment?

THE DEFENDANT: Yes.

THE COURT: And, Mr. Addis, I'm sure this is your signature.

MR. ADDIS: It is, Your Honor. There is one ambiguity, however, in the report which I have previously discussed with Mr. Ardito and I would just like to invite the court's attention to if I could.

THE COURT: I will do that as soon as I find out from Mr. Fee if indeed this is his acknowledgment that the United States has read the report and there are no material factual inaccuracies in the report.

MR. FEE: That's correct, Your Honor.

THE COURT: Very well. Now we can talk about ambiguities.

MR. ADDIS: Your Honor, the only ambiguity, and I think it may have some impact here, is under the listing of assets which Mr. Burns has, it lists, I believe, about \$16,000 worth of assets, but then after the listing of the assets, there is the parenthetical notation that these are the wife's assets. So that while the heading of that portion of the report is [4] "Defendant's assets" and it then lists \$16,000, it also makes clear that those \$16,000 worth of assets are not his but are in fact his wife's, and that's the issue I wanted to bring to Your Honor's attention, that in fact those assets are the sole and distinct property of his wife and not of Mr. Burns.

THE COURT: Thank you very much. I thought actually it was - well, it was very clear to me upon reading the report, because it says, "cash (wife, per plea agreement)" and I remembered that, and I also remembered the van.

MR. ADDIS: Yes.

THE COURT: And I also noted that Mr. Ardito did enough for me to know what he was talking about.

MR. ADDIS: Right.

THE COURT: But I think it's good for the record to have that clarified to the extent that you have done.

MR. ADDIS: Thank you.

THE COURT: Since both sides, Mr. Burns, have acknowledged receipt of the presentence report and have had an opportunity to be heard on any material factual inaccuracies, ambiguities and otherwise, I am now prepared to proceed to sentencing in this case.

Before proceeding to sentencing, however, I would like to advise both Mr. Cole and Mr. Addis that I have had an opportunity now to review the substance of the matters which you presented to me shortly before this hearing.

[5] Am I to understand that these are just copies that I have, because if – these are not the originals. I don't have Mrs. Burns' signature on here.

MR. COLE: That's correct, Your Honor. I have for the court at this time an original order form that is unsigned with attachments, which are copies or – originals, actually, of the agreements executed by all the parties and would hereby submit them to the court.

THE COURT: Is Mr. Turkus here today?

MR. COLE: He is not here today, Your Honor. However, I was – if it would help, I was present last night with him at the time he signed those documents.

THE COURT: All right.

MR. ADDIS: And I have spoken with him subsequently about that, Your Honor and he has signed those documents.

THE COURT: All right. Thank you very much.

Well, Counsel, as I indicated to you earlier this afternoon, I would be willing to sign these later today if I had had an opportunity to read the entire package. I have read the proposed order. I have read the substantive agreements, but I have not read the attachments, and it will only be after I have read everything that I would be willing to place my signature hereon.

MR. COLE: Absolutely, Your Honor. We have no objection to that and, of course, should you have any questions, [6] feel free to pose them to me and/or Mr. Addis.

THE COURT: Fine. As far as the substance is concerned, with the exception of "notarized" being misspelled, everything else seemed to be okay.

MR. COLE: My apologies, Your Honor.

THE COURT: No problem.

Then, Mr. Burns, we are now ready to proceed to sentencing. I shall first ask Mr. Addis to speak in your behalf. After I hear from him, I will then hear from Mr. Cole on behalf of the United States. Then you will be given an opportunity, Mr. Burns, to say anything at all that you wish to say with respect to the offenses for which you entered a plea of guilty or with respect to the sentence or anything else that you think you would like me to know since I shall be imposing sentence on you before you leave here today.

I would also like you to know, Mr. Burns, that in addition to the presentence report, I received letters, and I have read them all with care, from your daughter Deborah; from a sister, Mrs. Margaret Hughes; from your wife, Kathy Burns; from your father-in-law, Mr. Robert Martini; from a friend, Lieutenant Commander Deitz – I think that's the correct pronunciation – from a close friend, Mr. Marks; and from a sister, Mrs. Hanrahan. All of those matters have been presented to me and I have had an opportunity to review them.

I will be happy now to hear from you, Mr. Addis.

[7] MR. ADDIS: Thank you, Your Honor.

Your Honor, as Mr. Burns is before you, so are his family, his friends, his loved ones. Present in the courtroom today are his wife, Kathy Burns, three of his five children, including two sons who are approximately two years of age, and who I think right now are right outside the courtroom -

THE COURT: I saw them leave.

MR. ADDIS: Yes, Your Honor.

- His parents-in-law, a number of friends, his brother and his two sisters, many of the same people who have written you and several people who have not but who are here to show their support for someone that they have come to know and they have come to love. They have come to love this man. They have come to rely upon him as a friend, a husband, a father.

I'm not saying this to deprecate the seriousness of what he stands here having pled guilty to, because everybody acknowledges, particularly Mr. Burns, that it is a very serious offense.

Recently we have embarked, we the judicial system, on an attempt to try and codify how individuals should be punished. We who are familiar with the criminal justice system refer to them as the guidelines.

An exhaustive effort has been made by the government, by counsel for Mr. Burns, by the probation office, by the court to look at this offense in terms of the guidelines. It is a [8] serious offense. It is an offense he takes and has always taken full responsibility for, and the

guidelines measure his position in the government, his responsibility, the length of time that this offense occurred, the amount of money that was taken, the sophistication, all those aggravating factors that make this a serious offense, and they come out with a score. And there is a mitigating factor that is also included in here, and that is his acceptance of responsibility, and that then leads us to a new score and to a guideline range for a period of incarceration, and the guideline for this offense, as I recollect, is between 31 and 37 months.

Now, that's not my conclusion and it's not the probation office's. It is the guideline that has been reached after deliberation by the best panel that the courts, the congress could put together.

Now, Mr. Burns, as reflected in the probation report, got some credit for his acceptance of responsibility, for saying, "yes, I did it." But he has gone far, far beyond that. He has submitted and his wife has submitted to sworn depositions, hours of depositions by the government as to how this offense took place, as to how methods could be constructed so that this type of thing could never happen again, as to where his assets were. He has produced long before that evidence of assets the government never had and probably never would have had but for his telling them of that. The government's records, [9] Your Honor, only go back to 1982. Beyond that, they don't have records. He has freely acknowledged to the government that which they could never prove, that in fact he started this in 1980, and he told them how much, and not only did he tell them how much he took, and we're talking about things far beyond the statute of limitations and amounts they could never

prove, he has obligated himself to repay that, and this is not a hollow obligation.

As Your Honor now knows, this man has been stripped of every single thing he owns, except his clothes and his toilet articles. Whatever pension he had accrued in 27 years with the government, gone. Whatever funds he had put in his I.R.A., they are gone. Articles he inherited from his deceased parents, they are gone. Everything he has purchased, whether he purchased it before 1980, after 1980, whether he purchased it with money that he earned at any point in time, whether he had it in virtue of an inheritance, because he did have some assets as a result of an inheritance, that's all gone. He has not one bit of real or personal property other than his clothes and his toilet articles.

He has signed an agreement which Your Honor has now seen which obligates him to a repayment schedule, one that's consistent with the government's interests and one that's consistent with his responsibilities, because he is the father of five children, one of whom is in college now, two of whom, as [10] Your Honor have seen, are just barely toddlers, and that family unit he must continue to provide for at a time when he's released, and he's aware of that obligation, and yet everything that he had set aside to take care of them, no matter how it was earned, is now gone, everything. Gifts he received from family members, gone. Everything signed over to the government now to be sold as part of his effort at restitution.

The obligation he has is never dischargeable except through payment, and he has obligated himself to that,

and that is completely aside from whatever tax obligations he has, because this agreement doesn't deal with that and he will have to resolve that with the internal revenue service.

And, Your Honor, that has not been taken into consideration in the guidelines because it isn't there beyond acceptance of responsibility, and we believe that when a man comes forward, albeit after having committed a serious offense - there's no denying that - and says, "yes, I did it and now I will go further. I will tell you things you could not have known. I will produce for you assets you would never have known about, and I will see that you have them all now and in the future," we believe that that is worthy of consideration, too, Your Honor. It does not undo what was done. But it does evidence the first steps towards coming back as part of society, and that's what this is all about, because he is going to have to do that.

[11] He is the sole support of his two children. His wife has not worked since the children were born. Before that time, she never - though she did work, she never earned enough to support what is now a small family. Yesterday she moved in with her parents. Her father is retired. She will now rely on her parents for child support while she tries to find work, enough to make their expenses. Her husband will be gone for some time.

And that some time, Your Honor, is why we are here, because soon, at some point, he will resume his place in society, and we don't know what place that will be. He does have one or two job offers. They are not for a lot of money, but they would enable him to resume the support

of his family and maybe with a little time resume making payments on his obligation.

But, Your Honor, if he is separated from his family for too long, then maybe that becomes much more difficult, because these children are only two years of age. He's only been married to his wife for a few short years, and he has to look to what he's going to come back to and rebuild and there has to be something there to rebuild.

Your Honor has many obligations at sentencing time. There is punishment. There's deterrence. There's also tailoring it to the individual. This is not a man who has a criminal record before this time. This is not a man whom I believe the court would consider to be a danger in the future. [12] That's not the way of these kinds of cases.

So Your Honor has to balance the punishment and the deterrence with what is to be done with this man.

Last night, Your Honor, several of the local news stations carried long stories about the federal authorities showing up to literally divest him of everything he owns. There's a lot of deterrence there. He has given up far more than he could have been made to in any lawsuit. That's his obligation. He understands that. He recognizes it. He's entered into it voluntarily.

As the government well knows, there wasn't 10 minutes of discussion whether this case would ever go to trial. This case was to be resolved immediately. Mr. Burns walked right into the probation officer and told him everything, sat down with Mr. Fee and Mr. Cole and a series of investigators and a court reporter and for hours went over every nuance, not only what he did but how

accounting controls could be strengthened in the future in the area in which he worked.

He has done everything he could since his arrest to try and make amends for what he's done. Is it enough? I suspect Your Honor will say No and that a period of incarceration is necessary. We only ask, Your Honor, that that period of incarceration be limited enough that he has a family to return to, that he has a future that he can work towards rebuilding, and we think the guidelines are the appropriate range, Your Honor. We ask Your Honor to consider a sentence within the guidelines. Thank you.

THE COURT: Thank you very much, Mr. Addis.

Mr. Cole, I'll be happy to hear from you now.

MR. COLE: Thank you, Your Honor.

Indeed, when we come to a sentencing hearing, it is a serious matter because it sends a lot of signals throughout the community, throughout the nation. In a case like this which has had much publicity, there are things to be gained from that.

In Mr. Burns' favor as he comes before you today, Your Honor, there are some things. There are his acknowledgment of his guilt in this matter. There is his agreement to make restitution, and I would represent to the court that to the best of our knowledge, by and large Mr. Burns has indeed complied with his plea agreement as far as the things that he was required to do.

But on the other side of the ledger is what can only be termed an outrageous crime. The nature of the funds which Mr. Burns has taken should be considered. A.I.D. is an agency which provides foreign assistance from our

country's treasury. It provides food, medical attention, agricultural attention, industrial help, economic help to countries throughout the world to help feed people, clothe people. This is achieved through money. By taking the money that Mr. Burns took, he prevented or reduced the ability of A.I.D. to fulfill these laudatory and [14] humanitarian functions.

Now, it can be noted that the money that Mr. Burns took might have been from a leftover travel fund here or there, but these unused funds which he did take would have gone into the coffers of A.I.D., could have gone into many other areas to do good work. This is something which should be considered on the side of harm, which should be considered as to the level of punishment that's appropriate.

Much can be said about the laxness with which A.I.D. had treated some of this money and its accounting procedures on the money, creating perhaps a target of opportunity for Mr. Burns. But what must be remembered is that Mr. Burns was put in the position of trust at A.I.D. to protect the public's money in these kinds of endeavors and he was charged with making sure it went where it was supposed to go. He was the control.

Mr. Burns was not a master criminal. He was a person who was given some trust. He was asked to protect money and he abused that trust in an extreme fashion.

It is always sad whenever a person who is in a public office abuses the trust that they are given in that office. There are undoubtedly others in other governments agencies who are in a similar situation as Mr. Burns had occupied at A.I.D. and this sentence that you give today,

Your Honor, must send a message of deterrence to those people.

We are then left with the enormity of Mr. Burns' crime. [15] As reflected in the agreement which Your Honor has before you, the full amount is one million 370-some odd thousand dollars that he has taken. If this is not the largest, it is certainly one of the largest single thefts of public funds committed in the history of the american criminal law, and what is striking about it, Your Honor, is the attitude which Mr. Burns had towards this money. It is clear that this money was not stolen out of a need. It was stolen out of pure greed. He had the attitude that the United States Treasury was his personal bank account. Anything he wanted, he bought, and any luxury which he felt that he wanted to lavish upon himself and his family, in whatever quantity or quality, he would thus lavish.

As an example, people buy video games today. They go to a toy store, they buy the games, but Mr. Burns would go and buy a commercial video game worth \$2,500, at least, the kind that are found in bars.

Both Mr. and Mrs. Burns had their own vehicles. Yet Mr. Burns decided to go and buy himself a toy of a sports car in addition.

The year of 1985 when Mr. Burns built his house, he stole almost half a million dollars of government funds to pay for that house.

All of this is not to state to the court that the specific items are important but to show the attitude Mr. Burns had with this money, the attitude of, "I can spend whatever I [16] want because I have unlimited funds in the

Treasury of the United States due to my position of trust."

Maybe we do owe a debt of gratitude to Mr. Burns for having shown us that maybe we can't trust all of our financial officers and financial watchdogs and maybe we need more controls in our government, but until these controls are in place, your sentence must serve to deter the others who are in those positions, who are in the positions Mr. Burns was in and are able to, because of the lack of controls, breach that trust. Your sentence must show more is required of a person and will be exacted from a person than merely having to pay back what they have stolen.

Thank you, Your Honor.

THE COURT: Thank you, Mr. Cole.

Mr. Burns, I will be happy to hear from you now, sir.

THE DEFENDANT: Your Honor, I want to apologize and tell everyone I'm sorry and I'm ashamed of what I did. I'm sorry for the hurt I've put to my family and myself and my five children. That's all.

THE COURT: Thank you, Mr. Burns.

Is there anything further from you, Mr. Addis?

MR. ADDIS: Just, Your Honor, to clarify. As Mr. Cole mentioned, these were travel funds which were not expended at A.I.D.

THE COURT: All right.

[17] Mr. Burns, I have been able, of course, to learn a lot about you since the date you appeared before me and entered your plea of guilty to one count of theft of government funds, a class C felony, one count of false claims against the government, a class D felony, and one count of tax evasion, also a class D felony.

The court has learned about your background, your family, your children. I have learned about your employment history, the fact that you were married about just three years ago to your present wife and that you have twin sons not quite two years old.

I have learned that there has never been any indication or suggestion that you have suffered from any type of psychological or psychiatric impairment.

I have learned that your physical condition is good and that there has been absolutely no reason to believe that you have ever been drug dependent or abused alcohol.

I have learned that you are a graduate of a local high school and attended Montgomery College in nearby Maryland and that you have been employed by the United States Agency for International Development for 21 years.

Mr. Burns, I have given serious consideration to the appropriate sentence in this case. I have listened with great care to Mr. Addis and to Mr. Cole.

I agree with Mr. Addis that you have indeed made an [18] effort to return that which you stole that you may still have in your possession.

I understand from this agreement that you have executed today that you are turning over your home that you had built with all of its refinements, vehicles, whatever monies you have, including the money in your retirement account, in an effort to make restitution of that which you stole.

Of course, the statute of limitations is only a five-year period, but it is interesting today that you have admitted that you have been stealing from the Agency for International Development for fully eight years.

I, of course, was presented on the date of your plea a statement which I think tracked the checks from 1982 through 1988.

MR. COLE: That's correct, Your Honor.

THE COURT: And I reviewed that schedule very carefully. I reviewed it very carefully and it told me some things. In fact, it told me a lot of things. The statement that I received told me that during the year 1982 you made five separate withdrawals from the account. In 1983 there were four. In 1984 there were 10. In 1985 there were 18. In 1986, nine. In 1987, eight, and in 1988, that is, until May 26th of '88, there were six.

I would dare say that perhaps you should be commended for trying to repay the United States. Many times when people [19] think of the United States, they think of a government which doesn't have the same qualities as human beings, faces, personalities and what have you, but I wonder if it has ever occurred to you that the United States from whom you stole so much money is actually the people who are here in the courtroom in

support of you today. They are all the citizens of the United States. That's who you stole from. You may have thought about it as some faceless government, but you were stealing from the taxpayers of the United States.

Every penny that you stole meant that the taxpayers had to pay it, because the Government has to go on, and even though this may have been the type of money that you felt was going to some foreign governments and therefore unworthy, that's not your judgment to make, and even though it was money that you felt because someone had not used it for travel, therefore no one would miss it, I can assure you, your fellow citizens had to pay.

So you didn't steal from some faceless government. You stole from your fellow citizens, because we have had to put that money back. We put that money there in the first place and we have had to put that money back that you have stolen.

I want you to keep that in mind. You weren't stealing from some faceless person. You were stealing from every citizen of the United States, and it never seemed to bother you.

Mr. Burns, it may be true that you are trying to make [20] restitution and that you choose to pay back all that you stole, but the truth of the matter is if there had not been an investigation, there is no reason for me to believe that it would have stopped in May of '88. It stopped in May of '88 because of an investigation.

You, an employee for over 20 years, not only were you apparently trusted by your employers, but you had

taken an oath to perform your job and only your job. You violated that oath. You violated every bit of trust that anyone had put in you.

And, yes, I know you have experienced self-punishment. Most people who commit crimes do experience self-punishment, but that is not what sentencing is for. Sentencing is not designed to see if you have punished yourself but to exact that which the state believes is an appropriate sanction for your criminal conduct. That's what sentencing is for.

The guidelines which apply to this case do indeed reflect that the appropriate sentence is within the range of 30 to 37 months. Or is it 31 to 37?

MR. ADDIS: I believe it's 31 to 37, Your Honor.

THE COURT: All right, 31 to 37 months. But I have considered this matter and I believe, Mr. Burns, that the appropriate sentence can only be effected if the court departs from the guidelines. Under the appropriate circumstances, the court may depart from the sentence imposed by the guidelines. Title 18, section 3553(B) of the United States Code authorizes a [21] departure from the sentencing guidelines when the court finds that there exists an aggravating or a mitigating circumstance of a kind or to a degree not adequately taken into consideration by the sentencing commission in formulating the guidelines.

In its policy statement, the U.S. Sentencing Commission states that, "the presence of factors not adequately considered in the guidelines may, in the discretion of the sentencing judge, warrant departure from the guidelines.

Moreover, the court may depart from the guidelines even though the reason for departure is listed elsewhere in the guidelines if the court determines that in light of unusual circumstances the guideline level attached to that factor is inadequate."

Further, the Commission stated that, and I quote, "the controlling decision as to whether and to what extent departure is warranted can only be made by the court at the time of sentencing."

Thus, the guidelines expressly authorize the sentencing judge to consider circumstances at sentencing that may justify departure from the established guidelines.

I find at least three factors that I believe are involved in your offenses which I feel the guidelines either fail to address or to consider adequately.

First, I find that the guidelines, in considering the severity of the offenses, do not sufficiently weigh the duration of your criminal conduct. You have plead guilty to and thus [22] confessed to theft from the United States Government for at least six years, from February 25, 1982, to May 26, 1988. I admit that I recognize that the statute of limitations is only five years, all right.

Throughout the course of these years you caused over 53 different fraudulent checks to be issued by the United States Government.

While the guidelines permit me to consider the level of planning involved in the offense and the amount of money stolen, I cannot ignore the number of years and the amount of fraudulent transactions planned, schemed and executed by you, and I do not believe that they were

considered by the guidelines or, if so, adequately considered.

I find it significant that you persisted for over five years in perpetrating this criminal activity against the taxpayers of the United States. The failure of the sentencing guidelines to account for this, I believe, is a ground for departure from the guidelines.

Moreover, while the guidelines do take into consideration the fact that you violated the public trust in committing these crimes, the court finds that there was more involved in your acts of theft and false claims than a mere violation of public duty. You abused a process relied upon by the government to pay those who perform important and legitimate services for the United States. In taking advantage of this [23] vital system of remuneration over such a lengthy period of time, you have disrupted the functions of the government in addition to violating the public trust.

As I earlier indicated, you also totally violated your oath of employment by your devious conduct over many years. A million three could have been stolen at one time, but if a million three had been stolen at one time from A.I.D., it would have been recognized. You, in your devious manner, stole at a rate that made it difficult for it to have been easily ascertained.

The sentencing guidelines permit departure when "the defendant's conduct resulted in a significant disruption of a governmental function, and the court may increase the sentence above the authorized guideline range."

The court finds that you caused significant governmental disruption by stealing government funds in excess of one million dollars and by way of 53 separate fraudulent instruments.

Finally, the guidelines permit the court to depart from the prescribed sentence if the defendant committed the offense in order to facilitate or conceal the commission of another offense.

In this case, I refer to count three in which you failed to report the stolen income for calendar years 1982 through 1987, resulting in a tax obligation of almost half a [24] million dollars. By continually evading the payment of your taxes, you were also able to conceal crimes of theft and false claims. Certainly, if you had not concealed this, your crimes would have been discovered much earlier.

For these reasons, I find that several important elements of the crimes committed by you are not adequately considered by the sentencing guidelines, thus warranting a departure from its prescription.

This being the case, the court relies upon its own judgment and experience and finds that the guideline range for the offenses which you committed must be departed from.

Pursuant to the Sentencing Reform Act of 1984, Mr. Burns, it is the judgment of this court that you shall be committed to the custody of the Bureau of Prisons for a term of 60 months. Upon release from imprisonment, you shall be placed on supervised release for a period of three

years. The conditions of supervised release will include the following:

That you abide by the standard conditions of supervised release recommended by the Sentencing Commission, that you do not commit another federal, state or local crime, that you pay a special assessment to the United States of 50 dollars on each of the three counts of the information for a total of 150 dollars, that you provide to the probation officer access to any requested financial information, and that you contribute 200 hours of community service - I'm sorry - that you contribute [25] 100 hours of community service per year upon your release from confinement.

The court finds that restitution has been achieved through the plea - is it called a plea? It's not called a plea agreement.

MR. COLE: We have referred to it in the other agreements, Your Honor, as a plea agreement.

THE COURT: All right. It's a restitution agreement.

MR. COLE: Subsequent agreements would just be an agreement.

THE COURT: All right. The agreement of restitution. So the court will therefore not order any special restitution.

The court does find that based upon this agreement that you have entered into with the government this date that you will perhaps not have the ability to pay a fine of any type after your release, and for that reason the court does not order you to pay a fine. And I would also say that based upon the agreement that I read today that you

will not have the ability to pay the cost of incarceration, and for that reason the court will not order you to pay for incarceration. Because, however, you cannot pay a fine and cannot pay the cost of incarceration, therefore, the court is ordering you to contribute these hours of community service per year in lieu of the fine payment, and it is so ordered.

Now, I would like you to know, Mr. Burns, that since I [26] have departed from the sentencing guidelines, you have an absolute right to appeal your sentence, and I am sure that Mr. Addis will advise you as I am going to advise you now that the appeal must be filed within 10 days of today's date. If you no longer have the funds to note an appeal or to retain counsel for your appeal, the court of appeals will permit you to file without prepayment of costs, and the court of appeals will appoint counsel to represent you if you are unable to retain counsel of your own.

The defendant will step back with the Marshal.

MR. ADDIS: Your Honor, may I be heard before the defendant goes?

THE COURT: Certainly.

MR. ADDIS: Your Honor, we would ask that Mr. Burns be permitted to surrender himself to a place of incarceration for the following reasons:

First of all, the government has agreed not to oppose such a request, but we have affirmative reasons for requesting that. One, we would ask the court ultimately to recommend to the Attorney General the camp at Allenwood for this reason:

Mrs. Burns, the mother of the two small children, has a grandmother who lives about 35 minutes from the camp at Allenwood. If Your Honor were to recommend the camp at Allenwood, then Mr. Burns would most likely be incarcerated there and Mrs. Burns could then visit him much easily, [27] particularly given the difficulty of visiting him with the two children. She could go up. She could stay with her grandmother and then the camp would not be far away. So we would ask that Your Honor recommend Allenwood.

We would further ask, Your Honor, that Mr. Burns be permitted to surrender himself for these reasons:

One, he has absolutely abided by every condition of his release so far, both reporting to pretrial services and being here when necessary.

Secondly, I am informed by the representatives of the Bureau of Prisons and the probation office that it will take somewhere between two and probably three weeks to designate an institution for Mr. Burns, which means that in that interim, if he is taken into custody now, he will just be in a local holding facility.

THE COURT: It won't be in D.C. jail, I don't believe.

MR. ADDIS: And that's exactly the problem, Your Honor, that it then becomes exceedingly difficult, one, to find a place to house him; two, to have a place where I can discuss with him the things that must be done in the next 10 days. And, therefore, we would ask, Your Honor, that he be permitted to surrender himself at the earliest date set by the Bureau of Prisons. If they can designate a place in three days, I mean, that would be fine. I'm told

that absent some admonition from Your Honor to make it more quickly that it tends to be running [28] about two to three weeks right now for them to designate an institution. But if we don't do that, we will just be adding one more body to a local problem for two to three weeks until they can take him to one of those institutions for the rest of his sentence, and I would ask, therefore, that he be permitted to surrender himself at that time.

THE COURT: Mr. Cole, I know you are not going to take any position with respect to surrender, but I wonder do you wish to take any position with respect to the recommendation of Allenwood.

MR. COLE: The government has no objection to that recommendation, Your Honor.

THE COURT: All right. Well, with respect to Allenwood, just let me say this. It might be an institution that they would suggest for him anyway.

By the way, let me make it clear, and I think I should make it clear on the record, he is still category I. I increased the - criminal history I. I increased the category from 19 to 24, all right. So, it is likely that he would be designated to an institution similar to Allenwood, and for that reason, Mr. Addis, I will gladly make that recommendation, but I'm sure you understand and I just want Mr. Burns to know that that is all, absolutely all that it is. I cannot tell the Bureau of Prisons where to house people. I haven't the slightest idea whether Allenwood is as crowded as D.C. jail. I [29] don't know anything about that at this time. But I will recommend it and I would dare say that if space is available, it is likely that they will

comply with the recommendation. But I have no authority and I just want you to understand that. Is that understood?

With respect to the other area, Mr. Addis, I quite agree with you that there are things you are going to have to discuss with your client, and I also agree with you that the likelihood of his being housed in the District of Columbia jail is nil. It may be reopened. I don't know. But I believe that a voluntary surrender is not the appropriate thing in this case, and what I will do is I will just ask the Marshal service to try to house him in one of their contract places either Northern Virginia or Montgomery County, Maryland, pending his designation.

MR. ADDIS: Your Honor, I know the Marshals will do their best, but my experience with those types of situations is that frequently the prisoners get moved, they get moved with very little notice and certainly no notice to their counsel.

Your Honor, if it will help satisfy the court, I will take him personally to the institution that is designated. He has been in contact with me daily. Your Honor, we're talking about a period of two weeks so that he can say good-by (sic) to his children. There are still things that need to be done in terms of the transfer of assets. He doesn't have all his clothes even [30] out of the house yet. Because of the very long process in inventorying everything between Mr. Burns and the Government Representatives yesterday, a process that we thought would be finished yesterday hasn't even been completed, Your Honor.

Frankly, if he is incarcerated now, all it will mean is he will be shuffled from one institution to another, and

there may not even be room in any of the contract institutions. Those are being pressured now to take people either from Lorton or from the D.C. jail.

I have some experience in this recently in other cases and it is really, frankly, a terrible situation. I spent two days recently trying to find out where a client was because they're moving them just to try and find room. Whenever a little bit of space opens up, they'll just move people and they try and keep them close to where they need to be in terms of courts. He won't have that need. They will feel that, rightly so, they don't have to bring him back to court and that they can move him around.

Your Honor, we are only talking about a short period of time. If Your Honor would admonish the Bureau of Prisons to designate a place within 10 days, and if they haven't designated a place within 10 days, then we'll turn him over to the Marshals. But, Your Honor, he may have to consult with other counsel. He has to decide whether he's going to file an appeal. There are a lot of issues which are really going to be impinged [31] upon if Your Honor does that.

This man poses no flight danger. He's been here every single time he should have been. There's never been any problem with pretrial services. He's always stayed in touch with me. Many times the Marshals have made requests of him to sign a document or provide some information. At the time allotted, he appears for the appointment with the Marshals.

Your Honor, it would seriously impede our ability to pursue the things we have to pursue in the next 10 days. Your Honor has posed literally a novel issue and this may

be one of the very first appeals from a sentence outside the guidelines.

THE COURT: There have been many in this court.

MR. ADDIS: Maybe this will be the first to get to the Court of Appeals, Your Honor.

THE COURT: Maybe to the Court of Appeals, all right.

MR. ADDIS: This is a rather sophisticated issue to explain to my client. He has important decisions to make. He has to meet with his family and I would ask Your Honor to give the Bureau of Prisons 10 days or 11 days, just one day beyond the date he has to file his notice of appeal, to designate an institution, and if they haven't done it by that time, then let him report to the Marshals and they can hold him until an institution is designated. But I believe the Bureau of Prisons, if encouraged to do so by Your Honor, could even designate in 10 days.

[32] THE COURT: Well, just let me say, Mr. Addis, that Mrs. Burns and all of the children have my deepest sympathy, but my responsibility is just a bit different from their responsibility. I know they love Mr. Burns very much and I know they want very much to have him with them, but my responsibility is just quite different. It's not the same as their responsibility or even your responsibility, and I have given this great consideration. I appreciate your eloquence.

IT IS SO ORDERED.

(Proceedings Adjourned at 3:40 P.M.)

[Certificate Of Reporter Omitted In Printing]

UNITED STATES DISTRICT COURT

District of ColumbiaUNITED STATES OF
AMERICA

V.

William J. Burns
(Name of Defendant)JUDGMENT INCLUDING
SENTENCE UNDER THE
SENTENCING REFORM
ACT

Case Number 88-302

Filed Oct 14 1988
JAMES F. DAVEY, ClerkDavid Addis, Esq.
Defendant's Attorney

THE DEFENDANT:

[XX] pleaded guilty to count(s) 1-3.[] was found guilty on count(s) _____ after a plea of
not guilty.Accordingly, the defendant is adjudged guilty of such
count(s), which involve the following offenses:

Title & Section	Nature of Offense	Count Number(s)
18 U.S.C. 641	Theft of Government Funds	1
18 U.S.C. 287	False Claims	2
26 U.S.C. 7201	Attempt to Evade Income Tax	3

(Offenses committed 2/25/82 to 5/26/88, 6/29/88, and
2/25/82 to 5/26/88, respectively)The defendant is sentenced as provided in pages 2
through 5 of this Judgment. The sentence is imposed
pursuant to the Sentencing Reform Act of 1984.[] The defendant has been found not guilty on
count(s) _____, and is discharged as to such
count(s).[] Count(s) _____ (is)(are) dismissed on the
motion of the United States.[] The mandatory special assessment is included in
the portion of this Judgment that imposes a fine.[XX] It is ordered that the defendant shall pay to the
United States a special assessment of \$150.00,
which shall be due immediately.It is further ordered that the defendant shall notify
the United States Attorney for this district within 30 days
of any change of residence or mailing address until all
fines, restitution, costs, and special assessments imposed
by this Judgment are fully paid.

Defendant's Soc. Sec. Number:

578-54-876210/14/88

Date of Imposition of Sentence

Defendant's mailing
address:/s/ Norma Holloway
Johnson

(incarcerated)

U.S. DISTRICT JUDGE
Name & Title Judicial
OfficerDefendant's residence
address:10/14/88

(incarcerated)

Date

Defendant: William J. Burns Judgment - Page ____ of ____
Case Number: 88-302

IMPRISONMENT

The defendant is hereby committed to the custody of
the United States Bureau of Prisons to be imprisoned for
a term of sixty (60) months.[XX] The Court makes the following recommendations
to the Bureau of Prisons:

that the defendant be incarcerated at the federal institution at Allenwood, Pennsylvania.

- ☒ The defendant is remanded to the custody of the United States Marshal.
- ☐ The defendant shall surrender to the United States Marshal for this district,
- a.m.
- ☐ at ___ p.m. on ___.
- ☐ as notified by the Marshal.
- ☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons
- ☐ before 2 p.m. on ___.
- ☐ as notified by the United States Marshal.
- ☐ as notified by the Probation Office.

RETURN

I have executed this Judgment as follows:

Defendant delivered on ___ to ___ at ___, with a certified copy of this Judgment.

 United States Marshal
 By _____
 Deputy Marshal

Judgment - Page ___ of ___

Defendant: William J. Burns
 Case Number: 88-302

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of ___

three (3) years

While on supervised release, the defendant shall not commit another Federal, state, or local crime and shall comply with the standard conditions that have been adopted by this court (set forth on the following page). If this judgment imposes a restitution obligation, it shall be a condition of supervised release that the defendant pay any such restitution that remains unpaid at the commencement of the term of supervised release. The defendant shall comply with the following additional conditions:

- ☐ The defendant shall pay any fines that remain unpaid at the commencement of the term of supervised release.

The defendant shall provide the U.S. Probation Office with financial information.

The defendant shall complete one hundred (100) hours of community service per year during supervised release.

Judgment - Page ___ of ___

Defendant: William J. Burns
 Case Number: 88-302

STANDARD CONDITIONS OF SUPERVISION

While the defendant is on probation or supervised release pursuant to this Judgment:

- 1) The defendant shall not commit another Federal, state or local crime;
- 2) the defendant shall not leave the judicial district without the permission of the court or probation officer;
- 3) the defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;
- 4) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
- 5) the defendant shall support his or her dependents and meet other family responsibilities;
- 6) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;
- 7) the defendant shall notify the probation officer within seventy-two hours of any change in residence or employment;
- 8) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician;
- 9) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
- 10) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate

with any person convicted of a felony unless granted permission to do so by the probation officer;

- 11) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;
- 12) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
- 13) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;
- 14) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

These conditions are in addition to any other conditions imposed by this Judgment.

Defendant: William J. Burns
Case Number: 88-302

RESTITUTION, FORFEITURE, OR OTHER PROVISIONS OF THE JUDGMENT

The Court finds that the defendant is unable to pay a fine or the cost of incarceration.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATE OF AMERICA	:	Criminal No.
	:	88-0302
vs.	:	FILED
WILLIAM J. BURNS	:	OCT 14 1988

MEMORANDUM ORDER

Defendant William J. Burns entered a plea of guilty to the following offenses: theft of government property, in violation of Title 18, U.S. Code, section 641 (1982); false claims against the government in violation of Title 18, U.S.C. Code, section 287 (1982); and tax evasion in violation of Title 26, U.S. Code, section 7201 (1982).

The Sentencing Guidelines are applicable to this defendant. Pursuant to the Guidelines, defendant may be sentenced to a prison term of 30 to 37 months. Under the appropriate circumstances, however, the Court may depart from the sentence imposed by the Guidelines. Title 18, U.S. Code, section 3553(b) (1982), authorizes a departure from the Sentencing Guidelines when the Court finds that "there exists an aggravating or mitigating circumstance of a kind, or to a degree not adequately taken into consideration by the Sentencing Commission in formulating the Guidelines. . . . In its policy statement, the U.S. Sentencing Commission states that the presence of factors not adequately considered in the Guidelines may, in the discretion of the sentencing judge, warrant departure from the Guidelines. Moreover, the Court may depart from the Guidelines even though the reason for departure is listed elsewhere in the Guidelines if the

Court determines that in light of unusual circumstances, the Guideline level attached to that factor is inadequate. Further, the Commission stated that the "controlling decision as to whether and to what extent departure is warranted can only be made by the court at the time of sentencing." United States Sentencing Commission, Sentencing Guidelines, § 5K2.0. Thus, the Guidelines expressly authorize the sentencing judge to consider circumstances at sentencing that may justify departure from the established Guidelines.

The Court finds at least three factors involved in the defendant's offenses which the Guidelines either fail to address or to consider adequately. First, the Court finds that the Guidelines, in considering the severity of the offenses, do not sufficiently weigh the *duration* of defendant's criminal activity. The Court recognizes that the statute of limitations on the crimes committed by defendant is only five years, but defendant has confessed to theft from the United States Government for over six years, from February 25, 1982, to May 26, 1988. Throughout the course of these six years, defendant caused fifty-three different fraudulent checks to be issued by the United States Government. While the Guidelines permit the Court to consider the level of planning involved in the offense, and the amount of money stolen, the number of years and the amount of fraudulent transactions planned, schemed, and executed were not considered pursuant to the Guidelines. The Court finds it significant that the defendant persisted for over five years in perpetrating this criminal activity against the taxpayers of

the United States Government. The failure of the Sentencing Guidelines to account for this is a ground for departure.

Moreover, while the Guidelines do take into consideration the fact that defendant violated the public trust in committing these crimes, the Court finds that there was more involved in defendant's acts of theft and false claims than a mere violation of public duties. Defendant abused a process relied upon by the government to pay those who perform important and legitimate services for the United States. In taking fraudulent advantage of this vital system of remuneration over such a lengthy period of time, plaintiff has disrupted the functions of the government in addition to violating the public trust.

In addition to violating the public trust, defendant totally violated his oath of employment by engaging in this protracted, devious conduct. A million, three hundred thousand dollars, if stolen at one time, would have been much easier to detect than the same amount of money stolen over a lengthy period of time. In his particularly devious manner, defendant stole at a rate and in a manner which made detection very difficult.

The Sentencing Guidelines permit departure when the "defendant's conduct resulted in a significant disruption of a governmental function, [and] the court may increase the sentence above the authorized guideline range." *Id.* at § 5K2.7. The Court finds that defendant caused significant governmental disruption by stealing government funds in excess of one million dollars, over a six year period, and by way of fifty-three separate fraudulent instruments.

Finally, the Guidelines permit the Court to depart from the prescribed sentence if "the defendant committed the offense in order to facilitate or conceal the commission of another offense . . ." *Id.* at § 5K2.9. In this case, as stated in Count III, the defendant failed to report the stolen income for calendar years 1982-1987, resulting in a tax obligation of almost half a million dollars. By continually evading the payment of his tax liability, the defendant concealed the crimes of theft and false claims. Certainly, if this concealment had not taken place, defendant's crimes would have been discovered much earlier.

For these reasons, the Court finds that several important elements of the crimes committed by defendant are not considered fully by the Sentencing Guidelines, thus warranting departure from its prescription. This being the case, the Court relies upon its own judgment and experience and finds that the range of thirty to thirty-seven months for the offenses committed by defendant is insufficient and does not reflect the magnitude of defendant's criminal conduct. The Court, therefore, increases the offense level from nineteen to twenty-four which provides a sentencing range of fifty-one to sixty-three months. Pursuant to the Sentencing Reform Act of 1984, it is the judgment of the Court that defendant be committed to the custody of the Bureau of Prisons for a term of sixty months.

/s/ NORMA HOLLOWAY JOHNSON
UNITED STATES DISTRICT JUDGE

DATED: October 14, 1988

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued November 16, 1989 Decided January 12, 1990

No. 88-3161

UNITED STATES OF AMERICA

v.

WILLIAM J. BURNS

Appeal from the United States District Court
for the District of Columbia

MIKVA, Circuit Judge: This case requires us to rule on the validity of the trial judge's decision to depart from the sentence range contemplated in the Federal Sentencing Guidelines. The defendant, William J. Burns, pled guilty to theft of government funds, making a false claim against the government, and income tax evasion, crimes for which he expected to receive a sentence of 30 to 37 months in prison pursuant to the applicable Guidelines range. Despite the agreement of the U.S. attorney to the 30-37 month range and the recommendation of Burns' probation officer that Burns receive a sentence within that range, the trial judge found three reasons for an upward departure and sentenced Burns to 60 months in prison. Burns appeals his sentence, contending that the trial judge relied on impermissible grounds in enhancing his

sentence and that the extent of departure was unreasonable. He also maintains that the Federal Rules of Criminal Procedure and the Guidelines require that he be given advance notice of the judge's intention to depart. Because we find that the trial judge relied on three legitimate grounds for her departure decision and that nothing in the law requires a trial judge to provide advance notice of her intention to depart from the Guidelines, we affirm. As we are troubled by the plea bargaining procedure used in this case, we suggest that future plea agreements explicitly address the possibility that the trial judge may depart from the Guidelines, even if such a departure is not recommended by the government or the probation officer.

I. BACKGROUND

Burns was employed by the United States Agency for International Development ("AID" or "the agency") from 1967 until 1988. Beginning in February 1982, he used his position as a supervisor in the agency's Financial Management Section to authorize the payment of unused travel funds from the U.S. Treasury to Vincent Kaufman. However, the payments to Kaufman were really a front for diverting government funds to Burns' own pocket. From 1982 to 1988, Burns authorized the issuance of 53 checks totaling in excess of \$1,200,000. Burns' scheme was discovered after a routine security check revealed that he owned a \$400,000 house despite his annual salary of \$35,000. Prior to his arrest, but after the government became aware of his embezzlement activities, Burns authorized the issuance of two checks in the name of Vincent Kaufman; these checks formed the basis for the

government's case against Burns on charges of making false claims against the government.

After his arrest, Burns and the government entered into an agreement whereby Burns agreed to plead guilty to theft of government funds in violation of 18 U.S.C. § 641, making a false claim against the government in violation of 18 U.S.C. § 287, and evasion of income tax in violation of 26 U.S.C. § 7201. Burns agreed to surrender all of his assets, except for some minor personal property, and to pay restitution to the government by surrendering 50 percent of all his future annual income over \$40,000 and 100 percent of all future annual income over \$70,000. He also agreed to cooperate fully with the government in its investigation of the matter. Under the agreement, both parties understood that Burns' plea would be covered by the Sentencing Guidelines and that a sentencing level of 19, Criminal History Category I (30-37 months) would apply to his case.

The probation officer's presentence report also concluded that Burns' sentence would be within the 30-37 month range, and did not recommend that Burns be given a sentence in excess of that prescribed by the Guidelines. At the sentencing hearing, however, Judge Johnson concluded that in order to give Burns an appropriate sentence, the court had to depart from the Guidelines. She noted that according to 18 U.S.C. § 3553(b), the sentencing judge is entitled to depart from the Guidelines in light of aggravating or mitigating circumstances that were not adequately considered by the Sentencing Commission. The trial judge found three factors involved in Burns' case that were not adequately addressed by the Guidelines. First, she found that although the Guidelines

permit adjustment for the amount of money stolen and the level of planning, they do not give sufficient weight to the duration of the crime. Because the defendant's fraudulent scheme persisted for six years and involved 53 separate instances, the judge concluded that departure from the Guidelines was warranted.

Additionally, while the Guidelines do consider the defendant's violation of the public trust, the trial judge found that the defendant's systematic abuse of the government's process of paying legitimate vendors, in addition to violating the public trust, constituted a disruption of government functions. Since § 5K2.7 of the Guidelines permits departure when "the defendant's conduct resulted in the significant disruption of a governmental function," the trial court found this to be a second reason for imposing an enhanced sentence.

Finally, as the Guidelines also permit departure if "the defendant committed the offense in order to facilitate or conceal the commission of another offense," the trial judge concluded that Burns' evasion of over \$400,000 in taxes allowed him to conceal his theft and false claims and accordingly justified an upward departure from the Guidelines.

II. ANALYSIS

A. *Standard of Review*

The Sentencing Guidelines provide that a trial judge can depart from the Guidelines based on aggravating or mitigating circumstances which were not adequately considered by the Sentencing Commission in formulating the

Guidelines. 18 U.S.C. § 3553(b). If a factor is one which the Commission has already considered, it must be "present to a degree substantially in excess of that which ordinarily is involved in the offense of conviction." Guidelines § 5K2.0, ¶2. Determining whether a certain factor is an appropriate ground for enhancement of a sentence involves a question of statutory interpretation. To the extent that this requires us to decide whether the Commission adequately considered that particular factor, we subject the court's determinations to plenary review. *United States v. Diaz-Villafane*, 874 F.2d 43, 49 (1st Cir. 1989), cert. denied, 110 S. Ct. 177 (1989); see also, *United States v. Burke*, No. 88-3179, slip op. at 5 (D.C. Cir. Oct. 31, 1989). Once it has been established that a factor is a legally permissible basis for departure, we give broad deference to the district court's judgment as to the appropriateness of considering this factor, and we will uphold the departure so long as it is reasonable. 18 U.S.C. § 3742(e)(4). We will only reverse the factual findings that the trial court relied upon in its departure decision only if they are clearly erroneous. *Diaz-Villafane*, 874 F.2d at 49.

B. Reasonableness of Departure

Burns maintains that the trial court erred in departing from the Guidelines. He contends that the concealment and duration factors upon which the trial judge relied in her departure decision had already been contemplated by the Sentencing Commission and thus could not form a separate basis for departure. Burns also argues that the trial court's finding that he significantly disrupted government functions was not supported by the record. He further contends that the degree of departure

was unreasonable and that the trial court unfairly failed to give him notice of its intention to depart from the Guidelines. We dispose of each of Burns' arguments in turn.

1. Concealment

Burns maintains that because the Guidelines allow upward adjustment for "more than minimal planning," Guidelines §§ 2B1.1 and 2F1.1., his concealment of his theft and false claims through income tax evasion were factors that had already been considered within the Guidelines and therefore could not provide the basis for departure. Burns contends that since his "more than minimal planning" was not extraordinary, departure was unwarranted.

The trial court's upward departure for concealment, which is permitted under § 5K2.9 of the Guidelines, applied to Burns' tax evasion, and not to the fact that he used other elaborate methods to conceal his crimes. Therefore, while the Guidelines discuss an adjustment for "more than minimal planning" for theft of government funds and false claims, this applies only to the planning of those offenses. Burns' evasion of taxes to conceal his embezzlement scheme constituted a separate basis for an upward departure, distinct from the fact that his activities were well planned. Since it is possible to be guilty of tax evasion without concealing other crimes, we conclude that the trial court's decision to depart based on concealment was reasonable.

2. Duration

Burns argues that duration was also a factor considered by the Commission under the "more than minimal planning" adjustment and therefore cannot provide a separate ground for departure. He notes that the commentary to the Guidelines states that the "more than minimal planning" adjustment applies to "any case involving repeated acts over a period of time." Guidelines § 1B1.1, note 1(f). Therefore, since the Guidelines already accounted for the duration of his crime, and his theft was not highly unusual when compared to others, Burns contends that the departure decision was erroneous.

The trial court, however, specifically stated that her decision to enhance Burns' sentence was based not simply on planning but upon the prolonged and repetitive nature of Burns' crime. According to the Guidelines' commentary, "more than minimal planning means more planning than is typical for commission of the offense in simple form." Guidelines § 1B1.1, note 1(f). The court properly observed that in incorporating a "more than minimal planning" adjustment into the Guidelines, the Commission did not consider "the number of years and the amount of fraudulent transactions . . . executed" by a defendant. Burns' crime involved 53 separate acts of theft over a six-year period. The trial judge could reasonably have concluded that the duration of *execution*, then, warranted enhancement. We note that a defendant who persists in his criminal activity over a period of years may deserve a harsher sentence than a defendant whose crime was limited in duration because the former has arguably had more opportunities to renounce his illegal schemes.

Accordingly, the trial court's finding that the duration of Burns' crime justified departure, was not dependent upon the amount of planning involved in the crime, and thus was not unreasonable.

3. Disruption of Government Functions

Burns argues that because the record does not indicate that his activities caused any disruption of government functions beyond the disruption which is inherent in the offense, the departure decision was erroneous. He notes that the Commission's policy statement regarding disruption of government functions indicates that "unless the circumstances are unusual the guidelines will reflect the appropriate punishment for such interference." Guidelines § 5K2.7. Burns argues that because his crime went undetected for six years and the money he stole was a tiny fraction of AID's budget, his activities could not have caused a significant disruption of government functions.

The Guidelines contemplate departure for crimes which significantly disrupt the function of the government. We reject Burns' argument that this was not an appropriate case for such departure. The fact that Burns' crimes went undetected for so long does not indicate that his activities caused little disruption. Rather, the record indicates that he diverted government resources and used federal mechanisms to perpetrate his crimes. Such misuse of the government's vendor payment process is clearly disruptive; it diverts federal resources from legitimate to illegitimate recipients.

Although disruption of government functions is an inherent aspect of crimes such as bribery, the Commission's policy statement indicates that "when the conviction is theft . . . and that theft caused disruption of a government function, departure from the applicable guideline more readily would be appropriate." Guidelines § 5K2.0, ¶ 2. In this case, the trial judge found that Burns' misuse of his position resulted in a "disruption of government function" beyond that which naturally accompanies diverting resources from legitimate to illegitimate recipients. Burns' manipulation of AID procurement apparatus required the unwitting assistance of many government personnel, who were diverted from their legitimate tasks by the demands of his scheme. The record demonstrates that Burns relied upon clerks to prepare forms necessary to divert government funds, and that his checks to "Vincent Kaufman" - issued by the United States Treasury - required administrative resources: including time and personnel to process these checks. Burns' illegal use of AID's system of paying its vendors, then, can be readily distinguished from those crimes involving basic theft of government property, such as stealing government supplies. The trial judge's conclusion that Burns' entanglement of two federal departments in his plan constituted disruption of a government function cannot be deemed unreasonable.

4. Reasonableness of Departure

Burns argues that the amount of departure - 23 months, or 62 percent above the maximum sentence under the Guidelines - was unreasonable in light of the trial court's reasons for departure and the purposes

behind the punishment. Burns contends that the 60-month sentence is greater than necessary to serve the purposes of retribution, deterrence, incapacitation, and rehabilitation that were contemplated by the Sentencing Reform Act of 1984. 18 U.S.C. § 3553(a). He notes that he has already lost all of his assets and that he must surrender a portion of all future earnings. Moreover, as he will never work for the government again, he asserts that excessive punishment is unnecessary to protect the public from his crimes. Finally, he argues that his financial skills will go to waste in prison and could better benefit society if he were released sooner.

The trial court is best situated to decide the length of the sentence and its finding should not be reversed unless it is arbitrary or capricious. *United States v. Juarez-Ortega*, 866 F.2d 747, 748 (5th Cir. 1989). We cannot conclude that the sentence of 60 months is unreasonable. The trial judge offered three specific and legitimate grounds for departure, and it is not the place of this court to second-guess her sentencing decision. See *United States v. Roberson*, 872 F.2d 597, 606-607 (5th Cir. 1989), *cert. denied*, 110 S. Ct. 175 (1989).

C. Notice of Intention to Depart

Burns maintains that the trial court erred by failing to give him an opportunity to comment on its intention to depart from the Guidelines. He notes that Federal Rule of Criminal Procedure 32(a)(1) requires the court to give both sides notice of the probation officer's presentence report, including any factors indicating that departure from the Guidelines would be appropriate. Furthermore,

at the sentencing hearing, counsel must be given an opportunity "to comment upon the probation officer's determination and on other matters relating to the appropriate sentence." Burns maintains that Rule 32(a)(1), when read in conjunction with Guidelines § 6A1.3, requiring that the trial court fairly resolve any disputed factor important to sentencing, requires the sentencing judge to notify the parties of her intention to depart and provide them with an opportunity to comment.

Burns' notice argument lacks merit because a requirement that the court inform the parties of its intention to depart is not contemplated by Rule 32. Such a requirement would constitute a radical deviation from past practice and would impose a cumbersome burden on trial judges. Since the defendant had an opportunity to address the court before sentencing during his allocution and has a right to appeal his sentence, he has not been harmed by the trial court's lack of notice.

Despite the contrary conclusions of certain circuits, *see, e.g., United States v. Nuno-Para*, 877 F.2d 1409, 1415 (9th Cir. 1989); *United States v. Cervantes*, 878 F.2d 50, 55 (2d Cir. 1989); *United States v. Otero*, 868 F.2d 1412, 1415 (5th Cir. 1989), we do not see any language in Rule 32 or the commentary requiring the sentencing court to provide the parties with advance notice of its intention to depart from the Guidelines. Pre-Guidelines sentencing procedures never called for such notice of the judge's intention to deviate from a plea bargain or a probation officer's recommendation. This is not a case in which the court is going beyond the facts in the presentencing report in deciding to depart from the Guidelines. All of

the facts that formed the basis of Judge Johnson's decision were contained in the presentencing report, and Burns could have challenged the factual findings if he had believed that they were erroneous. Concededly, a defendant will have less incentive to challenge these facts if he expects a sentence within the Guideline range. Burns is not challenging the facts – his 53 separate instances of theft over a six-year period and his tax evasion – which formed the basis for the trial judge's departure decision. His right to appeal preserves his ability to challenge the *legal* ground on which the departure decision rests.

Finally, because defense counsel and the defendant are allowed to address the court prior to sentencing, the defendant has been given an opportunity to persuade the trial judge why sentencing within the Guidelines is warranted. Although the defendant might have made a stronger argument for himself if he had known that the judge was intending to depart from the Guidelines and the reasons for such a departure, we do not see any language in Rule 32 or the Guidelines requiring the judge to tell the defendant he should make his best case.

The Guidelines are relatively new and are only beginning to be tested. It is true, as Burns points out, that the Guidelines envision a more formalized sentencing process. Guidelines § 6A1.3, Commentary ¶ 1. However, without a more specific command from Congress or the Commission, we do not conclude that the process must include advance notice of the trial judge's decision to depart from the Guidelines.

D. *The Plea Bargaining Procedure*

Although we do not find merit in Burns' notice argument, we are troubled by the plea bargaining procedure used in this case. The plea agreement reached between Burns and the government specifically provided that if either the probation office or the trial court reached a calculation different from the 30 to 37 months that the parties had agreed on, the plea bargain would be null and void. However, the agreement did not mention what the consequences were to be if the judge decided to depart from the suggested sentencing range.

We note that the defendant has waived his right to withdraw his guilty plea and face a trial. Therefore, the question as to whether he should be able to withdraw his guilty plea in light of the trial judge's decision to enhance his sentence is not at issue. Nonetheless, we are disturbed by the ambiguity in the language of the plea agreement regarding what should happen if the trial judge decided to depart from the suggested range. We realize that the Sentencing Guidelines are new to both prosecutors and defense attorneys and that such unforeseen situations may arise from time to time. We think it would be appropriate for prosecutors to modify the plea bargain agreement language to make clear that the bargain either contemplates the trial judge exercising her enhancement powers, or allows the defendant to withdraw his plea if the trial judge contemplates enhancement. If the language is left in its present vague form, a serious question could arise as to whether a defendant has reserved the power to withdraw a plea if the trial judge decides to depart from the sentencing range that the parties agreed upon.

III. CONCLUSION

Because the trial judge articulated three legitimate reasons why departure from the Guidelines was appropriate, her decision to impose a sentence in excess of the 30 to 37 month recommended range should not be disturbed. As the defendant has not been harmed by the trial court's failure to give him notice of its intention to depart from the Guidelines, and since such a notice requirement does not appear on the face of Rule 32 or within the Guidelines, we affirm.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

[Caption Omitted In Printing]

APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF COLUMBIA

BEFORE: Mikva, Silberman and D. H. Ginsburg, Circuit
Judges

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia and was argued by counsel. On consideration thereof, it is

ORDERED and ADJUDGED, by the Court, that the judgment of the District Court appealed from in this cause is hereby affirmed in accordance with the Opinion for the Court filed herein this date.

Per Curiam
FOR THE COURT:

/s/ Constance L. Dupre, Clerk

Date: January 12, 1990

Opinion for the Court filed by Circuit Judge Mikva

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

[Caption Omitted In Printing]

BEFORE: Mikva, Silberman and D. H. Ginsburg, Circuit
Judges

ORDER

Upon consideration of Appellant's Petition for Rehearing, filed February 23, 1990, it is

ORDERED, by the Court, that the petition is denied.

Per Curiam
FOR THE COURT:
CONSTANCE L. DUPRE, CLERK

BY: /s/ Robert A. Bonner
Deputy Clerk

[Filed March 15, 1990]

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

[Caption Omitted In Printing]

BEFORE: Wald, Chief Judge; Mikva, Edwards, Ruth B. Ginsburg, Silberman, Buckley, Williams, D. H. Ginsburg, Sentelle, and Thomas, Circuit Judges

ORDER

Appellant's Suggestion For Rehearing *En Banc* has been circulated to the full Court. No member of the Court requested the taking of a vote thereon. Upon consideration of the foregoing it is

ORDERED, by the Court *en banc*, that the suggestion is denied.

Per Curiam
FOR THE COURT:
CONSTANCE L. DUPRE, CLERK

BY: /s/ Robert A. Bonner
Deputy Clerk

Circuit Judge Thomas did not participate in this matter.

[Filed March 15, 1990]

SUPREME COURT OF THE UNITED STATES

No. 89-7260

William J. Burns,
Petitioner

v.

United States

ON PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the District of Columbia Circuit.

ON CONSIDERATION of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

June 28, 1990
